

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Moms Store,

Appellant,

v.

Case Number: C0224277

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination of the Retailer Operations Division (Retailer Operations) to withdraw the authorization of Moms Store (hereinafter Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278 in its administration of SNAP, when it withdrew the authorization of Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7, may file a written request for review of the administrative action with FNS.

CASE CHRONOLOGY

In a letter dated November 18, 2019, Retailer Operations informed Appellant's owner that it was being withdrawn from SNAP, as it no longer met the definition and requirements of a retail food store as set forth in § 271.2 and 7 CFR § 278.1(b)(1) of SNAP regulations. The letter stated that Appellant was primarily a restaurant because more than 50% of its gross retail sales are from heated and/or prepared foods not intended for home preparation and consumption. The letter also informed ownership that it could not submit a new application to participate in SNAP for a

period of six months from the effective date of the withdrawal, as provided by SNAP regulations at § 278.1(k)(2); however, if the business model remains the same, the application may be denied for the same reasons it was withdrawn this time.

In a letter dated November 22, 2019, Appellant's owner requested an administrative review of Retailer Operations' determination to withdraw its SNAP authorization. The request for review was granted by letter dated December 4, 2019, and implementation of the withdrawal held in abeyance pending completion of this review. Appellant sent additional documents in support of its appeal by letter dated December 16, 2019.

STANDARD OF REVIEW

In appeals of adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended 7 U.S.C. § 2018, and SNAP regulations at Title 7 of the Code of Federal Regulations (CFR) Parts 271 and 278. In particular, 7 CFR § 278.1(1) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR §278.1(n) addresses Periodic reauthorization and states, in part: At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form.

7 CFR § 278.1(l) states, in part: FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons.

- (i) The firm's continued participation in the program will not further the purposes of the program;
- (ii) The firm fails to meet the specifications of paragraph (b).

7 CFR § 278.1(b)(1)(iv) addresses Ineligible Firms, in part, as: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation. Firms that are considered to be restaurants, that is, firms that have more than 50% of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout. Establishments that include separate businesses that operate under one roof and share

the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.

7 CFR § 271.2, defines a retail food store, in part, as: An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale qualifying staple food items on a continuous basis, evidenced by having no fewer than [three]* different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at least [two]* such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50% of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter.

7 CFR § 278.1(k)(2) reads, in part: The firm has failed to meet the eligibility requirement for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section. Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial.

Regulatory Change

Due to a change in Federal regulations, foods cooked or heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). FNS published a final rule entitled, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP),” at 81 Federal Register 90675, on December 15, 2016. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT’S CONTENTIONS

Appellant’s owner made the following contentions in its request for administrative review, in relevant part:

- Our primary business activity is in the sale of food stuffs including bread, grains, dairy, canned foods, vegetables, fruit, meat, and seafood. The main source of sales is from the

*As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

uncooked seafood including flounder, tilapia, shrimp, crab, conch, catfish and many other fish produce. These items are not for immediate consumption, but to be purchased by customers to be prepared at home. In total, the sale of grocery stuffs and uncooked seafood total over 99% of our sales.

- The secondary business activity that we never participate in is the sale of hot-readily prepared foods for immediate consumption. These ready-to-eat foods include chicken wings, fish products, desserts, and salads. In total, the sale of hot or cold prepared foods account for a total of about 0% of our sales. Other than these primary ready-to-eat items, the sale of snacks, chips, soft drinks, and other miscellaneous items account for a total of about 1 % of our sales.

Appellant's owner provided an inventory list and store photos in its request for administrative review dated November 22, 2019, and a copy of the information previously provided to Retailer Operations in its subsequent correspondence dated December 16, 2019.

The preceding may represent a brief summary of Appellant's contentions; however, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically listed here.

ANALYSIS AND FINDINGS

The central issue in this case is whether Appellant is a SNAP ineligible restaurant under regulations at 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the store's application, Retailer Operations reviewed the reauthorization application, the store visit report, and documents provided by Appellant's owner. A review of the entire case record indicates by a preponderance of the evidence that Retailer Operations properly determined that Appellant does not qualify for SNAP as it is primarily a restaurant.

Store Visit Report

As part of a routine reauthorization process, an FNS contractor conducted a store visit on August 27, 2019, to assess Appellant's continued eligibility for SNAP. Although Appellant's reauthorization application stated that over 99% of Appellant's gross retail sales were in SNAP eligible staple food, Retailer Operations appropriately questioned the accuracy of this information after reviewing the store visit report. The store visit photographs indicated that the firm likely sold a much larger percentage of heated, hot and cold prepared foods than what was reported on the FNS-252-R and was most likely a restaurant.

The store visit report and photographs document that Moms Store is co-located with Moms Deli, and both businesses operate under one roof. There are two doors, but there is no barrier or wall that separates the businesses. Inventory is the same and all stock is stored together. There is one shared register, located at the Deli counter where prepared food is ordered, for prepared food and staple foods. There are empty coolers and shelves visible in the store photos. Appellant's food stock is insufficient to meet the staple food requirements, specifically in the dairy staple food category.

There is a large menu display board advertising combination platters and specials of hot and prepared food items. There is a designated seating area, with 18 tables and chairs and 4 booths, for customers to consume hot and prepared food onsite. There is a large food preparation area and kitchen that has a commercial refrigerator, freezer, and cooking sources. There are freezers and refrigerators with non-food and non-staple foods that are inaccessible to customers.

There is a display case of fresh fish, crab legs, lobster tails, bacon, and sausage with several specials posted. This would normally be considered staple food, but if heated before or after sale would be considered SNAP ineligible prepared food. The store visit report and outdoor signage document that the store does heat/cook food after sale for free. As noted above, foods heated after sale are now treated the same as prepared hot and cold food in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv).

The establishment is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out and require no additional preparation. Although food items in Appellant's firm may be available for sale fresh, it is more likely true than not true that the majority of foods in the establishment are actually sold prepared and/or hot and ready-to-eat. Pursuant to 7 CFR § 278.1(b)(1), such a firm is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's firm does not qualify as a retail food store for purposes of SNAP participation.

Marketing

Retailer Operations reviewed the firm's marketing through its outdoor signage, menus, and a review of google.com. Outdoor signage displays the store name as Moms Deli and advertises wings, fish, burgers, hot sandwiches, and hot food combos. Another sign reads, We accept EBT, Free cooking services available upon request. The exterior advertising was almost exclusively devoted to SNAP ineligible heated and hot prepared food.

Co-located wholesale/retail food concern

No co-located wholesale/retail food concern with 50% or less of its total sales in retail food sales may be authorized to redeem SNAP benefits unless it meets the criteria applicable to all retail firms.

Internal agency policy further clarifies SNAP regulations and states "An establishment that includes separate businesses that operate under one roof and have commonalities such as: a single management structure, shared space, logistics, back accounts, employees, and inventory, is considered to be a single entity. The different businesses cannot be evaluated separately; they are one establishment and the entire nature and scope of the businesses must be taken into account when evaluating it for program eligibility."

A preponderance of the evidence supports Retailer Operations' determination that Appellant is co-located with a restaurant. Both businesses operate under one roof, both businesses are owned solely by the same owner, both businesses sell similar foods, and both businesses share inventory. As such, it is also determined that more than 50% of Appellant's total gross retail

sales are in heated, hot and cold prepared food not intended for home preparation and consumption. SNAP regulation at § 278.1(b)(1)(iv) states, that “firms that have more than 50% of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores.” By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

Supporting Documents

After reviewing the reauthorization application and store visit report, Retailer Operations sent a letter dated September 24, 2019, to Appellant noting that additional information was needed to determine authorization eligibility.

Appellant’s owner responded to this request for additional information and provided gross sales receipts, invoices, Federal tax returns, Sales and Use returns, Articles of Incorporation, business and employee information for each entity.

Upon review, Retailer Operations found that both businesses are owned solely by Appellant’s owner. Each business is established as an LLC, both of which function interchangeably at the same location, and both have the same owner and manager. The Articles of Incorporation verify that Appellant’s owner is the sole member of each corporation.

The inventory is interchanged between the two businesses based on what the owner buys or orders. Invoices show that items are ordered in the name of one business, with notes stating it is being used in the other part of the store.

Retailer Operations reviewed the redemption summaries for the months of November and December 2018 and February and March 2019 and determined they were lower than the Sales and Use returns. Other months redemptions were higher than reported. Due to the determination that Appellant is a co-located business, Retailer Operations updated Appellant’s sales information by using both Federal tax returns provided and determined 97% of its total retail sales are from hot and prepared foods. Because the hot and prepared food sales exceeded 50%, Retailer Operations properly determined that the firm is a restaurant as defined by SNAP regulations at § 271.2 and § 278.1(b)(1)(iv).

CONCLUSION

Based on the analysis above, it is the determination of this review that Appellant is primarily a restaurant and is not eligible for SNAP participation under Criterion A or B. Appellant does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived. Further, the contentions presented by Appellant’s owner are not sufficient to show that the withdrawal decision should be reversed. Accordingly, the decision by Retailer Operations to withdraw the SNAP authorization of Appellant is sustained.

Pursuant to 7 CFR § 278.1(k)(2), ownership will not be eligible to reapply for participation as a SNAP retail food store for a minimum period of six months from the effective date of the withdrawal. However, if the business model remains the same, the application may be denied for the same reasons it was withdrawn this time. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, this withdrawal action shall become effective 30 days after delivery of this Decision.

General questions regarding the application process can be handled by contacting 877-823-4369 and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Danielle Chandler at Danielle.Chandler@usda.gov or (804) 309-3880 with questions about operations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office is unable to grant an extension.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

KIM DAMERON
Administrative Review Officer

July 9, 2020